

ANTITRUST LAW

E.U. Private Actions

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There has been considerable progress in recent years toward antitrust law convergence between the United States and the European Union. However, one area where the gulf between the two regimes remains wide is private antitrust enforcement. While U.S. antitrust cases make up a significant portion of the nation's court dockets, the number of recent successful E.U. private competition lawsuits can almost be counted on one hand. But that may be about to change.

Efforts now under way to modernize competition law in the European Union may bring meaningful private enforcement. In September 2004, the European Commission (E.C.) published a report on the state of E.U. private enforcement that found "total underdevelopment." See http://europa.eu.int/comm/competition/antitrust/others/private_enforcement/index_en.html. Europe's competition law leaders have indicated that enhancing private enforcement is one of their top priorities. Competition Commissioner Neelie Kroes stated in March that the absence of E.U. private enforcement "means that the comprehensive enforcement of the competition rules is not yet complete." Kroes cautioned that this leads to underdeterrence and means that "the victims of anti-competitive activity are not being compensated for their losses." The E.C. plans to issue a "green paper" on steps that could improve E.U. private enforcement.

An obvious model that the E.C. will consider in updating its private enforcement regime is the highly developed U.S.

system. The E.C. clearly will not endorse the wholesale adoption of the U.S. system. At the very least, cultural differences—and the European perception that there are too many lawsuits in the United States—will ensure that significant differences between the two regimes remain. However, the E.C. will have to assess carefully features of the U.S. system as it considers how to improve private enforcement in the European Union.

Key features of the U.S. private enforcement regime

In the United States, the antitrust laws are well entrenched in the nation's business culture. The U.S. antitrust laws explicitly provide for a number of incentives to encourage "private attorneys general," including permitting a successful antitrust plaintiff to recover treble damages, its attorney fees and costs, and injunctive relief (which can include behavioral and structural remedies). Plaintiffs in the United States can sue for violations of any one of the antitrust laws, not only "hardcore" offenses such as

price fixing. Additionally, federal law provides that a judgment obtained by the U.S. Department of Justice has prima facie preclusive effect in subsequent private litigation.

The U.S. courts also open their doors to all types of plaintiffs. Consumers and customers can recover unlawful overcharges or other damages, while competitors may recover lost profits, and government entities, including federal, state and municipal entities, may also bring actions, either as market participants or, at times, on behalf of their citizens.

U.S. law does limit the individuals entitled to sue under the doctrine of standing. For example, only "direct purchasers"—those that purchased the good subject to the unlawful overcharge directly from the defendant—are entitled to sue. This rule ensures that direct customers can bring suit while avoiding the complications that would accompany attempts to calculate the precise overcharge the customer passed on to each entity in the chain of distribution. But several U.S. states allow indirect purchasers (which often include consumers) to sue under state law.

The U.S. courts are hospitable to private antitrust plaintiffs. Plaintiffs generally can bring a case in the United States without having to allege the offense with great particularity. Further, once they reach the discovery phase, antitrust plaintiffs are afforded very broad discovery that makes it possible for them to obtain access to a significant number of the defendants' documents and witnesses. The courts also have reduced standards of proof concerning damages;

